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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY LANE,

Defendant and Appellant.

D042554

(Super. Ct. No. SCD171751)

APPEAL from a judgment of the Superior Court of San Diego County, William D. Mudd, Judge. Affirmed.

Michael Anthony Lane entered a negotiated guilty plea to possessing cocaine base for sale (Health & Saf. Code, § 11351.5) and admitted a prior conviction of possessing cocaine base for sale (Health & Saf. Code, § 11370.2) and a 1992 conviction of battery causing serious bodily injury (Pen. Code, § 243, subd. (d)),¹ charged as a strike prior

¹ All further statutory references are to the Penal Code.

(§§ 667, subds. (b)-(i), 1170.12, 668) after the trial court denied a motion to suppress evidence. (§ 1538.5.) The court sentenced Lane to prison for nine years: double the three-year lower term for possessing cocaine base for sale with a strike prior enhanced three years for the prior conviction of possessing cocaine base for sale. Lane contends the trial court erred in denying his motion to suppress evidence and in imposing the nine-year term.

FACTS

At approximately 11:30 p.m. on December 13, 2002, San Diego Police Officer George Cesena stopped Lane after Lane failed to stop at a stop sign. Cesena asked to see Lane's driver's license, registration and proof of insurance. Lane responded that he left his girlfriend's home in a rush to get her ice cream and that he left his wallet there. Lane's cellular telephone rang and it was a woman identified as his girlfriend. Lane handed the telephone to Cesena and she told Cesena that Lane had not just left her home and she knew nothing about his wallet. Cesena conducted a records check and learned Lane's driver's license had been suspended. Cesena returned to Lane's car and saw him trying to tuck a plastic bag that contained what appeared to be a controlled substance into his shirtsleeve. Cesena intended to arrest Lane for possessing a controlled substance, running the stop sign and driving with a suspended license but called for a backup unit. After the backup officer arrived, Cesena removed Lane from his car and placed him in handcuffs. Cesena found additional cocaine base in Lane's pocket. The backup officer searched the car's interior and found a bag containing marijuana, a razor blade, and

prescription drugs. Cesena testified that the area was well lit because it was known for narcotics use.

Lane testified that he gave Cesena his wallet, told him his driver's license was suspended, and Cesena told him he was being arrested for domestic violence. He testified that Cesena found the baggie containing rock cocaine in his sleeve when he patted him down. Cesena did not mention drugs before Lane got out of the car. Lane testified that the drugs were not sticking out of his sleeve when Cesena approached the car.

DISCUSSION

I

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) Here, while denying the motion to suppress, the trial court said:

"The court having heard the evidence in this case, having listened to the testimony of Officer Cesena and Mr. Lane, the court resolves every dispute in this matter in favor of Officer Cesena.

"In this matter, the court did not find Mr. Lane to be a credible witness. First of all, he was feeling the effects of cocaine base: he had only used it within 10 to 15 minutes prior to the stop. He claims he did not have a lapse of memory. He claims it did not affect his ability to relate, recall and recollect. Those are his claims. But there is a reason why people do take controlled substances.

"In this matter, the court does note that Mr. Lane is substantially larger in build than Officer Cesena, and Officer Cesena indicated he did call for a backup unit, based upon defendant's build and demeanor.

"The officer indicated that he did intend to arrest Mr. Lane for possession of [a] controlled substance, a moving violation, driving on a suspended license.

"In this matter, the court will deny the defendant's motion to suppress the evidence, finding that there was a legal basis for the continued detention as well as the [probable] cause to arrest the defendant, as well as plain view of the controlled substance and search incident to arrest."

In determining whether the trial court's findings are supported by substantial evidence, we must not usurp the trier of fact's assessment of credibility.

"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' [Citations.]" (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

Lane argues the officer's testimony that the plastic bag containing cocaine base protruded from his shirtsleeve and was in plain view is implausible because it was dark outside and the officer did not use a flashlight and, in his police report, Cesena said the reason for the arrest was an outstanding warrant for domestic violence. Lane is mistaken. Cesena testified the arrest took place in a well-lit parking lot and it was not dark. Cesena reviewed the police report at defense counsel's request and thereafter testified that the police report said that when Lane stepped from his car, Cesena advised him he was being arrested for possessing a controlled substance. The court believed Officer Cesena, not Lane who admitted he used rock cocaine 10 minutes before the stop.

Lane also argues that the evidence found in the container in the car was illegally seized since he was in handcuffs in custody outside the car when the search occurred. However, in *New York v. Belton* (1981) 453 U.S. 454, the United States Supreme Court held, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." (*Id.* at p. 460, fns. omitted.)

The trial court here did not err in denying the motion to suppress evidence.

II

In response to our request for additional briefing, Lane contends the court erred in determining his 1992 conviction for battery with serious bodily injury (§ 243, subd. (d))

is a serious felony within the meaning of section 1192.7, subdivision (c)(8) and using it as a strike conviction to increase his sentence. Lane primarily relies on our decision in *People v. Taylor* (2004) 118 Cal.App.4th 11 (*Taylor*).

Section 1192.7, subdivision (c) defines serious felonies. Battery with serious injury is not specifically enumerated as a serious felony. However, pursuant to subdivision (c)(8) of section 1192.7 a "felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice" qualifies as a serious felony.

In *Taylor*, the defendant physically assaulted his girlfriend, including by punching her in the face, which caused a small crack in the bone around her left eye, an injury that would normally heal without treatment. The defendant was charged with battery with serious injury, among other offenses, and an enhancement he had inflicted great bodily injury (§ 12022.7, subds. (a), (e)). The court instructed the jury pursuant to CALJIC No. 9.12 on the elements of battery with serious bodily injury. This instruction defined "serious bodily injury" as "a serious impairment of physical condition, including but not limited to the following: loss of consciousness, concussion, *bone fracture*, protracted loss or impairment of bodily function or the function of any bodily member or organ, or a wound requiring extensive suturing or serious disfigurement." (Italics added.) The court also instructed the jury pursuant to CALJIC No. 17.20 that "[g]reat bodily injury" . . . means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury." During closing argument, defense counsel argued the bone fracture was not "great bodily injury" because it was only a "moderate injury" but did not dispute the fracture was a "serious bodily injury." (*Taylor, supra*, 118

Cal.App.4th at p. 21.) The jury convicted the defendant of battery with serious bodily injury but rejected a finding he had inflicted great bodily injury. The trial court determined the battery with serious injury was a serious felony within the meaning of section 1192.7, subd. (c)(8). We disagreed.

In reaching our decision, we observed that while generally the terms "serious bodily injury" and "great bodily injury" are "described as being 'essentially equivalent' [citation] or having 'substantially the same meaning' [citations], they have separate and distinct statutory definitions." (*Taylor, supra*, at p. 24.) The *Taylor* jury had made the factual determination that while the victim's bone fracture qualified as a "serious bodily injury," it did not qualify as "great bodily injury" "because it was only a 'moderate' injury within the meaning of CALJIC No. 17.20." (*Id.* at p. 25.) We concluded, "[t]hus, the jury's finding that the bone fracture fell within the definition of serious bodily injury was not equivalent to a finding of great bodily injury," and "the usual assumption that the two terms have essentially the same meaning" could not be applied. (*Id.* at pp. 25-26.)

Lane's case is distinguishable from *Taylor*. First, *Taylor* involved a charged offense of a battery with serious injury and a jury finding that the defendant had not inflicted great bodily injury. Here, the battery with serious bodily injury was not a charged offense, but was a strike prior and Lane admitted he had been "convicted of the felony strike offense of battery inflicting great bodily injury." This case does not involve the unique factual situation key to the decision in *Taylor*, but the more typical situation where great bodily injury and serious bodily injury have the same meaning and indeed, a

situation where Lane admitted the battery with serious bodily injury involved the infliction of great bodily injury.

Moreover, Lane entered into a plea bargain that stipulated he would receive a nine-year sentence in exchange for the dismissal of other counts. "Where [a defendant has] pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) It is improper for an appellate court to reduce a negotiated sentence while allowing a defendant to retain the benefits of a plea agreement (e.g., dismissal of other counts). (*People v. Enlow* (1998) 64 Cal.App.4th 850, 854.) A defendant is estopped from complaining of a sentence to which he agreed. (*People v. Hester, supra*, 22 Cal.4th at p. 295.)

Thus, even if Lane had not admitted his prior battery with serious bodily injury conviction was a serious felony, it would be inappropriate to reverse the finding and reduce his sentence since he stipulated to a prison term of nine years as part of a plea agreement in exchange for the People's agreement to dismiss another count and three prison prior enhancements.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

AARON, J.